Supreme U. S.
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No. 03-222

In The

Supreme Court of the United States

CITY OF OKLAHOMA CITY,

Petitioner,

v.

SHAUNA E. SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

All parties are listed in the caption. Petitioner, The City of Oklahoma City, a municipal corporation and charter city of the first class organized pursuant to the laws of the State of Oklahoma, will be referred to as "Petitioner" or "City." Respondent, Shauna E. Smith, will be referred to as "Respondent" or "Smith."

The initial case filing included the following individually named defendants: L.D. Allen; Don Browning; Paul Burley; Thomas Hart; Mike Heath; Dale Marshall; Billy Pratt; Nathan Pyle; Darren Raines; David Shupe; Marty Stupka; and Mike Williams. The trial court granted the individual motions to dismiss these defendants. There was no appeal by Smith as to these dismissed individual defendants; therefore; they are not parties to this proceeding.

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STATUTES

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42 U.S.C. §§ 2000(e)-5(e)(1), *et seq.* 9

STATEMENT OF THE CASE

Respondent Smith was hired as a police officer with the Petitioner City of Oklahoma City (the "City") in September 1989, and the City promoted her to the position of canine officer in December 1994. In a plot to discourage her, Sgt. Don Browning, the canine trainer, paired Ms. Smith with "Ex," the crazy dog. Ms. Smith successfully trained and qualified with her canine partner and was assigned to the Hefner Patrol Division where she endured a constant stream of uninvited lewd comments, physical contact, and pretextual discipline devised to run her off.

In June 1998, she complained of sexual harassment and filed a grievance with the Fraternal Order of Police ("FOP"), which was denied. Ms. Smith filed two EEOC charges in August 1998 and February 1999, respectively. Ms. Smith quit the police department November 16, 1999, and on November 24, 1999, sued the City for sexual harassment, hostile workplace, retaliation, and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000, et seq.).

In an order denying the City's motion for summary judgment on the issue of the supervisory status of K-9 trainer Don Browning, the court stated that it considered Sgt. Browning a higher-ranking officer with some level of supervisory authority over Ms. Smith.

A jury trial was held April 12-20, 2001, and the jury returned a unanimous verdict against Smith.

STATEMENT OF THE FACTS

While training in the police academy, Smith knew that she wanted to become a K-9 officer. Smith was assigned to work in the IMPACT unit of the police department in 1993, and her supervisor at that time was Bob Horn. Mr. Horn testified that Ms. Smith did an excelient job, was passionate about her job, and received commendations from FBI Director, Louis Freeh, and other agencies.

In December 1994, the City promoted Smith to the position of K-9 officer, and she started her K-9 training in January 1995 at the K-9/Equine Center located north of the Canadian River at 14th and Portland in Oklahoma City. Smith was the only female K-9 officer. From January 1995 to April 18, 1995, Sgt. Browning trained Ms. Smith and he told her how to train her dog – he gave her a schedule, and told her what to do on a daily basis. During her training period as a K-9 officer, Sgt. Browning was responsible for maintaining the K-9 facility and kennels, and he had sole responsibility for Ms. Smith's one-on-one training,

In December 1994, G.W. Davis, who worked as a mounted patrol officer with the City police department for fifteen years, overheard Don Browning tell Lt. Pyle and Lt. Allen: "Not to worry about it . . . the cunt can't handle that crazy dog. He'll eat her up and she'll be out of here and she'll be off K-9." Don Browning was the head K-9 trainer and supervisor in K-9. Don Browning was responsible for assigning the dog Ex to Ms. Smith. V. VI., p. 1673. Ms. Smith was only the second or third female K-9 officer in the history of the police department, and Don Browning definitely did not want her in K-9. Don Browning was the

training officer in K-9 and he set out the plan for training the dogs and qualifying the dogs.

Ms. Smith also attended the training class which featured the Eric Muse videotape, and testified that the tape provided by the City in discovery, Plaintiff's Ex. 835, appeared to be an edited version of the one she saw in training class. Ms. Smith recalled that the training videotape included oral sex between the officer and the female in the motel room.

During her training at the K-9 facility, Ms. Smith saw very little of Lt. L.D. Allen, who was the head of the K-9/Equine division, and he had little to do with the training of her dog, Ex. Lt. L.D. Allen did not know much about dogs, and relied on Sgt. Browning to conduct all the training and qualification of canines. Don Browning was hostile toward Ms. Smith, treated her harshly, and did not like the fact that she was assigned to K-9.

Don Browning testified that as the manager of K-9 training, he was responsible for the day-to-day training of officers, scheduling training, and setting up training situations. As training supervisor, Sgt. Browning gave orders to the K-9 officers, and he gave the orders of how training was conducted. At the time of Ms. Smith's K-9 training, she was an officer, and Don Browning was a sergeant with the City police department.

At the K-9 facility, Ms. Smith was subjected to a dead snake placed in the women's restroom and a postcard placed on the bulletin board over Ms. Smith's mailbox with the words: "You can't run with the big dogs if you pee like a puppy." On February 14, 1996, a Wednesday training night, Sgt. Browning instructed Ms. Smith to use a solution that he had prepared to clean the kennels at the K-9

facility. Lt. Quinna Hill Macy was Ms. Smith's Hefner station supervisor, and she investigated the injury to Ms. Smith which resulted from the use a toxic disinfectant without protection. Ms. Smith required hospitalization for the injuries which resulted from the toxic fumes.

Don Browning referred to Vietnamese women as "gooks" and told Ms. Smith that in Vietnam, "we fuck 'em and stick grenades in their pussies." Sgt. Browning told Ms. Smith that the United States Police Canine Association ("USPCA") discourages female K-9 officers because of a woman's "odor" and the scent she leaves behind. On one occasion during K-9 training, Don Browning was alone with Ms. Smith and he asked her if she was on her menstrual period.

Don Browning testified that he was concerned about the aggression of Ex toward Ms. Smith, and that he asked the City veterinarian about the effect of a woman's menstrual period on a dog. On cross-examination, Don Browning denied having told the veterinarian, Dr. Petrina York, that Ms. Smith had previously acted as a prostitute to arrest johns, and that her officer skills were poor. However, Don Browning's testimony was impeached by the use of Plaintiff's Ex. 855-856, transcripts of phone interviews of Dr. York, who stated that Don Browning told Dr. York that Ms. Smith had poor partnering skills and that her previous job was to act as a prostitute. Dr. York never had a conversation with Browning about dog aggression and a woman's menstrual period, and her impression was that Don Browning did not like Ms. Smith.

Ms. Smith qualified with her dog in February 1995, and continued K-9 training for another month before her assignment to the Hefner police station. After her transfer

to Hefner, Ms. Smith continued training with Don Browning on Wednesday nights and the pattern of sexual harassment continued. Major David Shupe testified that the chain of command for K-9 officers is a "kind of complicated situation" because the K-9 officers were assigned to the four divisions with the City police department, and the K-9 division was in charge of their training and the care and upkeep of the animals, as well as the K-9 equipment.

All K-9 officers reported to the K-9 facility for training on Wednesday nights from 9:00 p.m. to 6:00 a.m., and often times the training activities were conducted outside of the K-9 facility in banks, wooded areas, or in the City of Norman. Ms. Smith's regular shift at the Hefner station was 9:30 p.m. to 6:30 a.m. In June 1995, Ms. Smith was promoted to the rank of sergeant.

From the time of her transfer to the Hefner police station until she resigned, Ms. Smith was subjected to sexual harassment, hostile work environment, retaliation and pretextual discipline. On July 22, 1998, Ms. Smith presented Plaintiff's Ex. 233, a written complaint of sexual harassment to Deputy Chief Heath.

In June 1998, Ms. Smith responded to a call at a parking lot. She got out of her police car, and saw Officer Mike Williams was standing next to a scout car with the back door open and a suspect was in the back seat. Officer Williams asked the suspect if he would like for Williams to put Ms. Smith in the back seat with him so he could have his way with her. Ms. Smith told Williams to "knock it off." In response, Williams said, "Bitch, I ought to just put you over my hood and butt-fuck you."

During July or August, 1998, at the parking lot of the Hefner station, Ms. Smith encountered Officer Darren

Raines who walked up to Ms. Smith and grabbed her crotch. In August 1998, in the break room of the Hefner station, police officer Phil Williams humiliated Ms. Smith in front of others by asking her if she had "dog cum" on her pants. Ms. Smith complained that a message was sent from her police car "MDT" unit on October 23, 1998, which read: "I like makin babbies with my dog!" Each time Ms. Smith complained to management, she was notified that there was insufficient evidence to support her complaints of sexual harassment.

In October 1998, while Ms. Smith was riding alone with her canine partner, she radioed that she was making a traffic stop. Officer Mike Williams pulled up in his police cruiser and Ms. Smith asked him to run license checks on the two occupants of the stopped car. Mike Williams said, "Don't tell me what to do, bitch," and grabbed Ms. Smith's arm and began twisting it.

In response to Ms. Smith's complaints that she was working in a hostile environment, Ms. Smith was interviewed by Major David Shupe in an intimidating and hostile manner on October 1998. Marty Stupka, the FOP president who attended the interview with Ms. Smith, said that the interview was way out-of-line and that Chief Berry's conduct was way out-of-line.

The City provided notice on January 27, 1999, Plaintiff's Ex. 109, that Ms. Smith was to be involuntarily transferred and reassigned from K-9 to the Will Rogers police station. Ms. Smith felt that the transfer was the end of her career as a police officer. On February 12, 1999, Ms. Smith filed a grievance with the FOP. On April 9, 1999, Chief Berry ordered Ms. Smith to go to John Call, Ph.D., for a fitness-for-duty evaluation. FOP president Stupka warned

Ms. Smith to be careful because Dr. Call didn't like police officers. Ms. Smith went to Dr. Call's office and tape-recorded her conversation with him. Dr. Call called Ms. Smith a sociopath and a "Milosovich sort of thing."

On June 15, 1999, at the suggestion of Marty Stupka, the president of the Fraternal Order of Police ("FOP"), Ms. Smith completed an injury-on-duty form in which Ms. Smith characterized her work environment as hostile and stated that she was being harassed. On November 16, 1999, Ms. Smith submitted her resignation.

M.T. Berry, the Chief of Police, is responsible for the sexual harassment policies for the entire City police department. However, Chief Berry does not know when sexual harassment training was conducted, if the training course includes videotapes, who teaches the subject or whether it is part of the yearly curriculum for persons in administrative capacities. Chief Berry does not know what is posted at the City police stations with regard to the sexual harassment policy or the procedure for reporting complaints of sexual harassment.

Chief Berry did not believe that a police yearbook photograph of a female officer with the caption "fresh meat" and "cherries" had any sexual connotation. Chief Berry did not see anything inappropriate about a yearbook photograph of a male officer with the caption "thinning hair due to stress trying to adjust to women in police work who aren't clerks, secretaries, or groupies." Marty Stupka, president of the FOP, testified that Chief Berry stated that it was permissible under the police department policy to have sex while on duty if the officer was cleared on his radio.

The personnel director for the City is Dianna Berry, the wife of Chief Berry. Mrs. Berry had no idea how many sexual harassment complaints were made by female employees of the City police department during Ms. Smith's employment; she had no documentation of sexual harassment training for police officers from 1994 to 1996; she does not know if sexual harassment training videotapes produced in discovery had been used or were shown to police officers; and she does not know who conducted sexual harassment training for the police department.

Near the end of the trial, an "original" Eric Muse videotape was admitted into evidence as Defendant's exhibit. The exhibit was not listed on the Final Pretrial Report, and plaintiff was not given an opportunity to view the videotape. The videotape was not played in open court because the court ruled it would take too much time – ten minutes – to play the videotape. During jury deliberations, the jury submitted a request to view the videotapes. Plaintiff objected but the court made both videotapes available to the jury during deliberations. After viewing the tapes, the jury returned a verdict for the defendant. The Court of Appeals for the Tenth Circuit reversed the jury verdict based on the jury instruction that Browning was not Smith's supervisor and remanded the case to the district court for a new trial on Smith's hostile work environment and constructive discharge claims.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether a supervisor's conduct is part of a timely hostile work environment claim where the supervisor's conduct falls

outside the statutory time period. Petitioner argues that the Tenth Circuit's opinion creates a standard which is in conflict with this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). However, neither the Tenth Circuit's actual ruling, nor the record below, raise the question presented by the Petition. A hostile work environment claim involved repeated conduct, and it does not matter that some of the component acts of the hostile work environment fall outside the statutory time period. The Tenth Circuit's ruling is not in conflict with *National Railroad Passenger Corp. v. Morgan*, and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. The Tenth Circuit's Ruling Does Not Conflict with *National Railroad Passenger Corp. v. Morgan* or Title VII.

The case below involves a hostile work environment claim comprised of a series of separate acts that collectively constitute one unlawful employment practice. The Petitioner creates the impression that Browning's conduct are discrete acts which are not part of the repeated conduct of Smith's hostile work environment claim and should be barred in equity or time-barred by 42 U.S.C. §§ 2000(e)-5(e)(1), et seq. Petitioner argues that the incidents involving statements and conduct of Browning are not part of the abusive working environment and because Browning was not involved in any continuing events after April 18, 1995, it would be grossly unfair to hold Petitioner liable for Browning's conduct. This Court has held that the statute does not separate individual acts that are part of the hostile environment claim from the whole for the

purposes of timely filing and liability. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002). Although Petitioner refers to Browning's conduct as "discrete acts" it never clearly identifies those retaliatory or discriminatory discrete acts or single occurrences which fall under the definition of "discrete acts." The Tenth Circuit stated that the jury could find the Petitioner vicariously liable for Browning's conduct even though it occurred outside the filing period. This Court has held an employee's EEOC charge is timely where the employee has filed a charge within 180 or 300 days of any act that is part of the hostile work environment. *See id.* The Tenth Circuit's ruling is not in conflict with *National Railroad Passenger Corp. v. Morgan*, and that holding was proper in all respects and does not call for a review by this Court.

II. This Case Does Not Present Any Novel or Important Question of Federal Law.

Petitioner argues that the Tenth Circuit's ruling holds that an employer can be vicariously liable in perpetuity for the alleged sexually hostile conduct of a supervisor. *See* Petition at 11. This contention is meritless. In *National Railroad Passenger Corp. v. Morgan*, this Court held that the entire time period of the hostile environment may be considered by a court for the purposes of determining liability even where some of the component acts of the abusive working environment fall outside the statutory time period. In this case, the conduct of Browning is part of a continuous pattern of incidents constituting a hostile work environment and this Court has held that the employer may be liable for all acts that are part of this single claim. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002). The Tenth Circuit's ruling is

correct and is not at odds with this Court's holding in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Review by this Court is unnecessary.

III. Petitioner Cannot Rely Upon Equitable Doctrines of Laches

Petitioner failed to preserve its arguments based on the doctrine of "laches or some similar bar." *See* Petition at 10-12, 14. Petitioner argues that it "is an injustice and grossly unfair" to hold an employer vicariously liable for the conduct of a supervisor whose conduct is part of the hostile environment claim, but whose specific acts occur outside the filing period. In the District Court, Petitioner failed to present or preserve any argument or evidence related to equitable doctrines. This case raises no significant issues which subject Respondent's claims to equitable doctrines that warrant this Court's review.

IV. The Record Does Not Support Petitioner's Argument that Intervening Acts Separated Browning's Individual Acts That Are Part of the Hostile Environment Claim From the Whole for the Purposes of Timely Filing and Liability

Petitioner argues that there were intervening discrete acts of discipline that should have operated to cut off any possibility of recovery for Browning's conduct. *See* Petition, p. 17-19. The record does not support Petitioner's argument that discipline, Smith's involuntary transfer, and resignation "cut off" any possibility of liability for Browning's conduct which occurred outside the statute of limitations. Smith's claims of sexual harassment include

disciplinary actions, retaliation and constructive discharge which are individual acts that part of the hostile environment claim and are part of the one hostile work environment claim which encompasses the whole. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002).

Petitioner failed to preserve its arguments based on separation of Browning's conduct by intervening acts. In the District Court, Petitioner did not present or preserve any questions related to the "intervening acts" argument, and this case raises no issues of separation of individual acts that warrant this Court's review.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari presents no genuine issues worthy of United States Supreme Court review, and urges the Court to deny certiorari.

Respectfully submitted,

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